

ETHICAL ISSUES IN LAW PRACTICE MANAGEMENT

By Andrew J. Beechko



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IF YOU EVER WANT TO START YOUR OWN PRACTICE, WHETHER AS A NEW ADMITTEE OR SOMEONE WHO IS SICK OF WORKING FOR SOMEONE ELSE, HERE ARE A FEW AREAS TO CONSIDER WHEN “GETTING STARTED”:

1. How much do I need to know about an area of law before I take on a case—Competence?
2. How much can I charge for my time—Fees?
3. Can I join an existing case and get paid—Fee splitting?
4. How can I get more clients—Advertising?

Resources

For many of us, passing the ethics portion of the California State Bar was a long time ago, so if you are like me your memory of each rule is somewhere deep in your subconscious. As a smart attorney it is always wise to re-familiarize oneself with the various ethics texts or practice guides available. Some texts that are widely used are 1) *Legal Ethics in the Practice of Law*, by Richard A. Zitrin and Carol M. Langford published by Lexis Law; 2) *Rutter Group California Practice Guide on Professional Responsibility*; and 3) *Index to the State Bar of California, California Compendium on Professional Responsibility*. In addition, the current *California Rules of Professional Conduct* (“CRPC”) are on the Internet at www.calbar.gov. Obviously there are other resources available but any of the aforementioned texts will provide meaningful information.

Duty of Competence

Even though there is a guarantee of a right to counsel in criminal cases, if you provide ineffective counsel causing the case to be overturned, the State Bar could discipline you and you could be subject to malpractice liability. If this happens, you are having a very bad day. Rule 3-110 of the CRPC defines the infraction of competency.

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It states “a member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.” The CRPC defines competence and the requirement to perform services with “1) diligence; 2) learning and skill; and 3) mental, emotional, and physical ability reasonably necessary for the performance of such services.” The competency requirement not only extends to the attorney but also to the supervision of the attorney’s staff including the paralegals. Even if the State Bar doesn’t find you intentionally or recklessly failed your client, you could arrive at your office one day and find a big fat malpractice suit waiting for you. Your ex-client will allege that you failed to adequately represent them and with adequate representation they would have prevailed. So you fight the malpractice suit and win; the time, money, and effort it takes for your defense will drain you.

So with this happy thought in mind, what do you do if a case walks into your office with a matter that you are not familiar with? Do you send them down the street to another lawyer? No, but you must acquire the skills necessary before performing the required services. Some ways to acquire the skills are: 1) take the time to research issues of law and application thoroughly; and/or 2) associate or consult with another counsel competent in the field. But remember, if you do associate with another counsel, you must inform your client and get their written consent if the other counsel is not a partner in your firm. Poor investigations, missed court hearings, missing filing dates, taking on too many cases, and not using adequate resources will most definitely cost you time and money in the long run.

On a side note, in an emergency, the CRPC states that a lawyer may give advice or assistance in a manner wherein the lawyer does not have the skill ordinarily required but only to the extent reasonably necessary. In another words, you can take the case but you must get competent counsel for your client as soon as you can to avoid liability.

This leads to another issue that plagues attorneys: communication. CRPC 3-500 states in part that a

lawyer “shall keep a client reasonably informed about significant developments relating to their employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed.” Being tired, working long hours, or being late for a date are not good excuses. Establish a system for returning phone calls (even if you block out certain times of the day for this) and address your clients’ requests for information and documentation. Keep this in mind and you may not get fired or find yourself answering to our higher authority (the Bar).

Fees

Now you have a client that you feel comfortable in representing; the next question is, what is a reasonable charge for your services? Is it open season? Can I charge the same as those big partners in the large law firms? Will this be my case to retire on? Well not exactly! Section 4-200 of the CPRC is pretty clear and

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states that a lawyer may not enter into an agreement or charge an illegal or unconscionable fee. And the fee doesn’t need to be collected to be in violation of this rule; all you need to do is to enter into an agreement for an illegal or unconscionable fee. So what is an illegal and unconscionable fee? An illegal fee could be an agreement between a client and an unlicensed attorney or an attorney that is not licensed in California. OK but you are licensed in California, what is an unconscionable fee? Most feel that a fee is unconscionable if it is overreaching, exorbitant, beyond reason, etc. But to complicate matters, the California Supreme

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Court gave eleven) factors to look at when setting your fee with the client. These factors should be taken into account at the time the fee is charged or the agreement is entered into (not three years later when the case is closed).

And the top eleven factors that can render a fee unconscionable are: 11) is the amount of fee proportional to the value of the services performed; 10) what is the relative sophistication of the lawyer and the client; 9) what is the novelty and difficulty of the question involved and the skill requisite to perform the legal service properly; 8) the likelihood, if apparent to the client, that the acceptance of the particular will preclude other employment by the lawyer; 7) the amount involved and the results obtained; 6) the time limitations imposed by the client or the circumstances; 5) the nature and length of the professional relationship with the client; 4) the experience, reputation and ability of the lawyer or lawyers performing the services; 3) whether the fee is fixed or contingent; 2) time and labor required; and the number one criteria is the informed consent of the client to the fee.

One final note, a large fee doesn't mean it is an unconscionable fee if you stay within the rules. Also remember that the trend in California courts is that fee arrangements not in writing are unenforceable, therefore document what you are doing, and be reasonable.

Fee Splitting

Is it possible to receive a referral fee when referring a client to another attorney? Can I share in the fee with other attorneys that are not partners in my firm if I do some work on the case? The answer is yes to both, but make sure you get a fee splitting agreement with the other counsel. Plus, you need written consent from the client for this arrangement. Going back to the good book, paragraph (A) of CRPC Rule 2-200 states that a lawyer "shall not divide a fee for legal services with a lawyer who is not a partner of, associate of, or shareholder with the lawyer unless: 1) the client has consented in writing thereto after a full disclosure has been made in writing that a division of fees will be made and the terms of such division; and 2) the total fee charged by the lawyers is not increased solely by reason of the provision for division of fees and is not

unconscionable as the term is defined in rule 4-200." This means that any fee splitting arrangement must have full disclosure and written approval from the client. This approval should also be received before the services are performed. Without written approval, you might be left with a handshake, a thank you, and no money for your efforts.

Now, if you still believe your friend, the other attorney, will split his earnings with you because he said he would and you brought him the client and worked on the case, you should look up *Chambers v. Kay* (2002) 29 Cal.4th 142, 126 Cal.Rptr.2d 536; 56 P.3d 645. This case is about two unassociated attorneys working in the same building. They routinely worked on cases together, but in this particular case did not have the clients consent in writing. The case came to a successful conclusion with a large award. Kay then refused to pay Chambers any portion of the award and of course Chambers brought suit. The court applied Rule 2-200 and Chambers lost out. Because Chambers was not a partner or associated with Kay, and there was no written consent from the client to a fee split, Chambers was left with empty pockets.

Advertising

Advertising and Solicitation are large areas to cover and extensively reviewed in Rule 1-400 of the CRPC. Standards comprehensively discussed in Section 3 (D) give some insight and lay out six commandments that cannot be broken when going after business. Every communication or solicitation will not: "1) contain any untrue statement; or 2) contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public; or 3) omit or state any fact necessary to make the statements made, in the light of the circumstance under which they are made, not misleading to the public; or 4) fail to indicate clearly, expressly, or by context, that it is a communication or solicitation, as the case may be; or 5) be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct; or 6) state that the lawyer is a "certified specialist" unless the lawyer holds a current certificate as a specialist issued by the Board of Legal

Specialization, or any other entity accredited by the State Bar to designate specialist.”

Another area to keep in mind when developing your advertising plan is that you can also be liable for false or misleading advertising under the California Business and Professions Code. Our wonderful legislature has set up a special area that addresses legal advertising. The sections to review are 6157-6159.2. The six pages I printed out are pretty specific regarding what we can and cannot say.

So this sounds a lot like truth in advertising and it is. The ad cannot embellish or hide facts. Marketing puffing is not allowed. Fake or misleading statements like you graduated from the Finest School when you actually went to Matchbox University or guarantees that you will win every case are not tolerated.

Advertising is a very complex issue and it is strongly recommended that you review some practice guides, the CRPC, and the Business and Professions Code before you launch your marketing campaign. One last point to keep in mind is that any ad that you produce must be

retained in your records for a minimum of two (2) years and made available to the State Bar if requested.

In summary, this article has lightly reviewed four key areas to consider when starting a private practice. These are proficiency, billable rates, fee splitting, and advertising. I would recommend that before you launch into a private practice, you thoroughly understand these areas and invest in materials that will guide you through the pitfalls that you can encounter.

Note: The author wishes to thank Carol M. Langford for her assistance and critique during the preparation of this article. Carol is past chairperson of the LPMT, a professor of law at the University of San Francisco, author of numerous books on legal ethics, and a private practitioner specializing in legal malpractice.

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the test on
page 10**

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QUESTIONS: ETHICAL ISSUES IN LAW PRACTICE MANAGEMENT



- | | |
|--|---|
| 1. As long as I try no one can claim I am incompetent.
True False | 12. Any fee splitting agreement requires written consent of the client.
True False |
| 2. One way to improve my competence is to associate with a more experienced attorney.
True False | 13. Fee splitting agreements have not been tested in the California Courts.
True False |
| 3. If I am not an expert in an area of law I shouldn't take the case.
True False | 14. I am a partner in a firm so I don't need written approval from the client to receive part of the fee.
True False |
| 4. I can be sued for malpractice even if the State Bar doesn't come after me for incompetence.
True False | 15. It is OK to increase a client's fee by 20% if I need to bring in another attorney.
True False |
| 5. If I tell a client that I was too busy to call them back; that satisfies my communication requirement with the State Bar.
True False | 16. During law school I did my studying at the Stanford Law Library so I can advertise that I attended that school.
True False |
| 6. I worked for a firm that charges \$500.00 per hour so I can charge \$500.00 per hour for my services.
True False | 17. My undergraduate degree is from Yale in underwater basket weaving but my law degree is from Matchbox University so I can tell my legal clients that I graduated from Yale when they ask what school I attended.
True False |
| 7. I can take on cases in California as long as I am licensed in some other state.
True False | 18. If I make a false claim I can be liable under the Business and Professional Code as well as the CRPC.
True False |
| 8. Even though our award was huge I can take my fee if it is not unconscionable.
True False | 19. I have passed the "Patent Bar" so I can advertise myself as a patent attorney.
True False |
| 9. In an emergency situation I can take a case as long as I pursue competent counsel as soon as possible.
True False | 20. Legal texts and practice guides are useless when it comes to the practice of law.
True False |
| 10. Even though I only filed the claim and another attorney took over the case, I can still take my 30%.
True False | |
| 11. As long as I have a handshake agreement with another attorney, I can fee split.
True False | |